



PATENT

Customer No. 22,852

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of:)
)
Jean-Louis H. GUERET) Group Art Unit: 3732
)
Application No.: 10/084,975) Examiner: Robyn Doan
)
Filed: March 1, 2002)
)
For: BRUSH FOR APPLYING) Confirmation No.: 2195
PRODUCT TO KERATINOUS)
FIBERS)

Attention: Mail Stop Appeal Brief-Patents

Commissioner for Patents

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Sir:

APPEAL BRIEF UNDER BOARD RULE § 41.37

In support of the Notice of Appeal filed March 28, 2006, and further to Board Rule 41.37, Appellant presents this brief and encloses herewith a check for the fee of \$500.00 required under 37 C.F.R. § 1.17(c).

This Appeal responds to the December 28, 2005 final rejection of claims 1-12, 14-16, 20-27, 33-51, 55, 61, 62, 64-72, 75-88, 91-104, and 107-111.

If any additional fees are required or if the enclosed payment is insufficient,

Appellant requests that the required fees be charged to Deposit Account No. 06-0916. 500.00 DP

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Real Party In Interest

L'ORÉAL S.A. is the real party in interest.

Related Appeals and Interferences

There are currently no other appeals or interferences, of which appellant, appellant's legal representative, or assignee are aware, that will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

Status Of Claims

Claims 1-111 remain pending in this application. Claims 13, 17-19, 28-32, 52-54, 56-60, 63, 73, 74, 89, 90, 105, and 106 have been withdrawn from consideration.

Claims 1-12, 14-16, 20-27, 33-51, 55, 61, 62, 64-72, 75-88, 91-104, and 107-111 stand finally rejected. The rejection of these claims is at issue in this appeal.

Status Of Amendments

No amendments have been filed subsequent to the final rejection.

Summary Of Claimed Subject Matter

Independent Claim 1

The subject matter set forth in independent claim 1 relates to a device for applying a product to keratinous fibers. The device may include a stem having two opposite ends and a brush portion connected to one end portion of the stem, the one end portion of the stem having a longitudinal axis. Paragraph [097], Figures 1-34.¹ The brush portion may have a free end that is not aligned with the longitudinal axis of the one end portion of the stem. Paragraph [0159], Figures 5-8, 17-23, 29, 30, 33, and 34.

The brush portion may include a core having a core free end, wherein at least part of the core is curved such that a line tangent to the core at any axial position along the core is not perpendicular to the longitudinal axis of the one end portion of the stem (e.g., Paragraph [0106], Figures 8 and 32) and a longitudinal axis of the core free end is not parallel to the longitudinal axis of the one end portion (Figures 8, 33, and 34). The brush portion may further include bristles connected to the core. Paragraphs [096] and [098], Figure 21. The bristles may include ends defining an envelope surface having a varying cross-section along at least a part of its length. Paragraphs [099]-[0101], Figure 8. The envelope surface may be asymmetrical about a midplane of the envelope surface, wherein the midplane is oriented perpendicular to the core. Paragraph [099]; Figures 1-8.

¹ In this Summary of Claimed Subject Matter, references to the text of the specification and drawings are provided to identify exemplary disclosure of certain subject matter. Those identifications are not necessarily exhaustive and should not be construed as imparting any limitation upon the scope of the claims.

Independent Claim 43

The subject matter set forth in independent claim 43 relates to a method of making an applicator for applying a product to keratinous fibers. The method may include providing a blank having a blank core and bristles connected to the blank core. Paragraphs [096] and [098]; Figure 21. The bristles may include ends defining a blank envelope surface having a varying cross-section over at least a part of its length (Paragraphs [099]-[0101]; Figure 8) and being asymmetrical about a midplane of the blank envelope surface, wherein the midplane is perpendicular to the blank core. Paragraph [099]; Figures 1-8. The method may also include curving at least a part of the blank core so as to form a brush portion including a core. Paragraph [0103]; Figures 8, 33, and 34. The core may have a core free end and a brush portion free end not aligned with a longitudinal axis of an end portion of a stem to which the brush portion is adapted to be connected (Paragraph [0159]; Figures 5-8, 17-23, 29, 30, 33, and 34), wherein a line tangent to the core at any axial position along the core is not perpendicular to the longitudinal axis of the end portion of the stem (Paragraph [0106]; Figures 8 and 32) and a longitudinal axis of the core free end is not parallel to the longitudinal axis of the end portion when the brush portion is connected to the end portion of the stem (Figures 8, 33, and 34).

Independent Claim 64

The subject matter set forth in independent claim 64 relates to a device for applying a product to keratinous fibers. The device may include a stem having two opposite ends and a brush portion connected to one end portion of the stem. Paragraph [097]; Figures 1-34. The one end portion of the stem may have a

longitudinal axis and the brush portion may have a free end that is not aligned with the longitudinal axis of the one end portion of the stem. Paragraph [0159]; Figures 5-8, 17-23, 29, 30, 33, and 34. The brush portion may include a core, wherein at least part of the core is curved such that a line tangent to the core at any axial position along the core is not perpendicular to the longitudinal axis of the one end portion of the stem. Paragraph [0106]; Figures 8 and 32.

The brush portion may further include bristles connected to the core (Paragraphs [096] and [098]; Figure 21), wherein the bristles include ends defining an envelope surface having a varying cross-section along at least a part of its length (Paragraphs [099]-[0101]; Figure 8). The envelope surface may be asymmetrical about a midplane of the envelope surface, wherein the midplane is oriented perpendicular to the core. Paragraph [099]; Figures 1-8. Further, the envelope surface may be non-cylindrical proximate the free end of the brush portion. Paragraph [0101]; Figure 8.

Independent Claim 80

The subject matter set forth in independent claim 80 relates to a device for applying a product to keratinous fibers. The device may include a stem having two opposite ends and a brush portion connected to one end portion of the stem. Paragraph [097]; Figures 1-34. The one end portion of the stem may have a longitudinal axis and the brush portion may have a free end that is not aligned with the longitudinal axis of the one end portion of the stem. Paragraph [0159]; Figures 5-8, 17-23, 29, 30, 33, and 34. The brush portion may include a core, wherein at least part of the core is curved such that a line tangent to the core at any axial position along the

core is not perpendicular to the longitudinal axis of the one end portion of the stem.

Paragraph [0106]; Figures 8 and 32.

The brush portion may further include bristles connected to the core (Paragraphs [096] and [098]; Figure 21), wherein the bristles include ends defining an envelope surface having a varying cross-section along at least a part of its length (Paragraphs [099]-[0101]; Figure 8). The envelope surface may be asymmetrical about a midplane of the envelope surface and the midplane may be oriented perpendicular to the core. Paragraph [099]; Figures 1-8. The envelope surface may taper toward the free end of the brush portion. Figure 8.

Independent Claim 96

The subject matter set forth in independent claim 96 relates to a device for applying a product to keratinous fibers. The device may include a stem having two opposite ends and a brush portion connected to one end portion of the stem. Paragraph [097]; Figures 1-34. The one end portion of the stem may have a longitudinal axis and the brush portion may have a free end that is not aligned with the longitudinal axis of the one end portion of the stem. Paragraph [0159]; Figures 5-8, 17-23, 29, 30, 33, and 34. The brush portion may include a core, wherein at least part of the core is curved such that a line tangent to the core at any axial position along the core is not perpendicular to the longitudinal axis of the one end portion of the stem. Paragraph [0106]; Figures 8 and 32.

The brush portion may further include bristles connected to the core. Paragraphs [096] and [098]; Figure 21. The bristles may have ends defining an envelope surface having a cross-section that continuously varies from the free end of the brush portion to

a location along the length of the brush portion. Paragraphs [099]-[0101]; Figure 8. The envelope surface may be asymmetrical about a midplane of the envelope surface, wherein the midplane is oriented perpendicular to the core. Paragraph [099]; Figures 1-8.

Grounds of Rejection

Claims 1-12, 14-16, 20-27, 33-51, 55, 61, 62, 64-72, 75-88, 91-104, and 107-111 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent No. 5,937,870 to Gueret ("Gueret") in view of U.S. Patent No. 5,176,156 to Ashtary et al. ("Ashtary").

Argument

The rejection of claims 1-12, 14-16, 20-27, 33-51, 55, 61, 62, 64-72, 75-88, 91-104, and 107-111 under 35 U.S.C. § 103(a) should be reversed

Appellant respectfully submits that the rejection of claims 1-12, 14-16, 20-27, 33-51, 55, 61, 62, 64-72, 75-88, 91-104, and 107-111 under 35 U.S.C. 103(a) should be reversed because a case of *prima facie* obviousness has not been established with respect to independent claims 1, 43, 64, 80, and 96. To establish *prima facie* obviousness under 35 U.S.C. § 103(a), the Examiner must show first that the prior art references teach or suggest all the claim limitations. *In re Royka*, 490 F.2d 981, 180 USPQ 580 (CCPA 1974). Second, the Examiner must show that there is some suggestion or motivation, either in the references or in the knowledge generally available to one of ordinary skill in the art, to modify or combine the references in a manner resulting in the claimed invention. *In re Rouffet*, 149 F.3d 1350, 47 USPQ2d 1453 (Fed. Cir. 1998). Third, the Examiner must show that there is a reasonable expectation of success to modify or combine the references. *In re Dow Chem. Co.*, 837 F.2d 469, 473, 5 USPQ2d 1529, 1531 (Fed. Cir. 1988). Moreover, “[b]oth the suggestion and the reasonable expectation of success must be found in the prior art reference, not in the Applicant’s disclosure.” *In re Vaeck*, 947 F.2d 488, 493, 20 USPQ2d 1438, 1442 (Fed. Cir. 1991).

In this case, *prima facie* obviousness has not been established with respect to independent claims 1, 43, 64, 80, and 96 at least because (1) neither Gueret nor Ashtary, nor any combination thereof, discloses or suggests all of the features recited in independent claims 1, 43, 64, 80, and 96; and (2) even if the supposed combination could yield all of the claimed features – a notion which Appellant disputes – the Office

Action does not set forth a proper motivation to modify or combine Gueret and Ashtary in a manner resulting in Appellant's claimed invention.

The applied references do not disclose or suggest all of the claimed features of independent claims 1, 43, 64, 80, and 96

Neither Gueret nor Ashtary, nor any combination thereof, provides any disclosure or suggestion of a device including, among other features, a "brush portion having a free end that is not aligned with [a] longitudinal axis of [an] end portion of [a] stem" connected to the brush portion, as recited in independent claims 1, 64, 80, and 96. Further, Gueret and Ashtary lack any disclosure or suggestion of a method of making an applicator, including, among other features, "curving at least a part of [a] blank core so as to form a brush portion comprising...a brush portion free end not aligned with a longitudinal axis of an end portion of a stem to which the brush portion is adapted to be connected," as recited in independent claim 43.

The Office Action acknowledges that "Gueret does not disclose the free end of the brush portion not being aligned with the longitudinal axis of the one end portion of the stem." Office Action, page 3, lines 15-17. The Office Action alleges that such a feature is shown in Fig. 2 of Ashtary. Office Action, page 3, line 21--page 4, line 3. The Office Action further alleges that "it would have been obvious to one having an ordinary skill in the art at the time the invention was made to employ the particular brush portion as taught by Ashtary et al into the mascara brush of Gueret for the purpose of enhancing the ability of the device to curl the eyelashes." Office Action, page 4, lines 6-11.

Ashtary is directed to a mascara applicator device including a scissor mechanism for clamping two brushlike elements together. Abstract and Fig. 1. Contrary to the

allegation in the Office Action, Fig. 2 of Ashtary does not disclose or suggest a device including, among other things, a “brush portion having a free end that is not aligned with the longitudinal axis of the one end portion of the stem,” as recited in claims 1, 64, 80, and 96, or a method involving “a brush portion free end not aligned with a longitudinal axis of an end portion of a stem to which the brush portion is adapted to be connected,” as recited in claim 43. The text of Ashtary does not appear to describe any such subject matter. For example, Ashtary lacks any description of the orientation of the free end of the brushlike element 32 relative to a longitudinal axis of sleeve-like member 28. Therefore, it appears that the Examiner’s allegation about an alleged “free end that is not aligned . . .” relies solely on the drawing of Fig. 2 in Ashtary.

Appellant disagrees with the Examiner’s allegation regarding Fig. 2 of Ashtary. Drawings can disclose claimed structure if they clearly show the structure which is claimed. *In re Mraz*, 455 F.2d 1069, 173 USPQ 25 (CCPA 1972); see also MPEP 2125 (Emphasis added). In this case, however, the drawings of Ashtary do **NOT** clearly show the above-mentioned features of claims 1, 43, 64, 80, and 96. For example, Fig. 1 of Ashtary is a perspective view, and Fig. 2 of Ashtary appears to be a partial perspective and cross-section view. With such limited views, the drawings do not provide an accurate indication of the orientation of the free end of the brushlike elements 32 with respect to respective longitudinal axes of the sleeve-like members 28. As such, it is unclear whether or not the free ends of the brushlike elements 32 shown in Figs. 1 and 2 are aligned with the respective longitudinal axes of sleeve-like members 28.

Appellant’s Fig. 34 illustrates an exemplary embodiment including Appellant’s claimed feature of a “brush portion . . . free end . . . not aligned with the longitudinal axis

of [an] end portion of [a] stem,” as recited in claims 1, 43, 64, 80, and 96. For example, Fig. 34 clearly shows the free end 186 of the applicator being curved as illustrated by the dashed outline. After bending, the free end 186 is offset from the longitudinal axis X by a distance d shown in Fig. 34. The non-alignment is clear. The embodiment of Fig. 34 and the other exemplary embodiments disclosed in the present application are distinguishable from other curved applicators, such as that shown in Fig. 1d of Gueret, which shows a curved applicator having a brush free end aligned with the longitudinal axis X. Even if the figures of Ashtary might possibly show that the brushlike elements 32 may be curved in some way, **it is not clear** whether or not any of the free ends of brushlike elements 32 are aligned with the respective longitudinal axes of the end portions of the sleeve-like members 28, especially because the figures do not show a representation of the longitudinal axis as a reference. Therefore, these drawings do not disclose or suggest a brush portion free end not aligned with a longitudinal axis of an end portion of a stem, as recited in the independent claims.

Because the Office Action does not establish that the applied art discloses or suggests all of the features of independent claims 1, 43, 64, 80, and 96, at least one of the essential criteria for establishing a *prima facie* case of obviousness is lacking. For at least this reason, the § 103(a) rejection of claims 1, 43, 64, 80, and 96, based on Gueret and Ashtary should be reversed.

There is no motivation or suggestion to combine the applied references in a manner resulting in Appellant's claimed invention

In addition to the fact that the Office Action does not show that the features of claims 1, 43, 64, 80, and 96 can be found in some combination of Gueret and Ashtary, a case for *prima facie* obviousness also has not been established with respect to these

claims at least because the requisite motivation, suggestion, or teaching to combine the references is lacking. Simply because references can be combined or modified does not render their combination obvious unless the references also suggest the desirability of the modification. *In re Mills*, 916 F.2d 680, 16 USPQ2d 1430 (Fed. Cir. 1990). The Examiner can satisfy the burden of establishing a *prima facie* case of obviousness “only by showing some objective teaching in the prior art or that knowledge generally available to one of ordinary skill in the art would lead that individual to [modify or] combine the relevant teachings of the references.” *In re Fine*, 837 F.2d 1071, 1074, 5 USPQ2d 1596, 1598 (Fed. Cir. 1988) (citations omitted) (emphasis added). The Federal Circuit has reaffirmed the high burden associated with establishing a *prima facie* case of obviousness and has emphasized the requirement of specificity. *See In re Sang-Su Lee*, 277 F.3d 1338, 61 USPQ2d 1430 (Fed. Cir. 2002).

In this case, the Office Action does not show that a skilled artisan considering Gueret and Ashtary, and not having the benefit of Appellant’s disclosure, would have been motivated to combine or modify the references in a manner resulting in Appellant’s claimed invention. Instead, the Office Action merely identifies certain asserted teachings of the cited references (e.g., Fig. 2 of Ashtary) without supplying a proper motivation for the alleged modification.

The Office Action alleges that a skilled artisan would have modified Gueret in view of Ashtary “for the purpose of enhancing the ability of the device to curl the eyelashes.” Office Action, page 4, lines 7-10. This allegation appears to be based on a passage in Ashtary including that language. However, the full sentence actually reads: “Also, the brushlike elements can be slightly arched concavely along its longitudinal axis

[sic] to further enhance the device's ability to curl the eyelash (see FIG. 2)." Col. 3, lines 61-64. As is evident from this passage, Ashtary discloses that slightly arching the brushlike elements enhances the ability to curl eyelashes, not any non-alignment of the brushlike element free end as implied by the Examiner. In fact, as discussed above, the disclosure of Ashtary is silent with regard to the positioning of the free end. Since neither Ashtary nor Gueret nor any other source provides any motivation or suggestion to modify Gueret to include a non-alignment feature, nothing provides any motivation or suggestion for the modification proposed in the Office Action. Consequently, the conclusions in the Office Action were not reached based on facts gleaned from the cited references and, instead, teachings of the present application were improperly used to reconstruct the references.

For at least the foregoing reasons, the required motivation to combine or modify the applied references is lacking. As such, *prima facie* obviousness has not been established with respect to claims 1, 43, 64, 80, and 96, and the § 103(a) rejection of those claims should be reversed.

The applied references do not show a reasonable expectation of success

In order to carry the initial burden of establishing a *prima facie* case of obviousness under 35 U.S.C. § 103(a), the Examiner must also show that there is a reasonable expectation of success. See M.P.E.P. § 2143. The Office Action, however, is completely silent as to any allegation of reasonable expectation of success in combining the alleged teachings of Gueret and Ashtary.

Appellant submits that the alleged combination of Gueret and Ashtary does not show a reasonable expectation of success because, among other reasons, the device

of Ashtary functions in a significantly different manner than the device of Gueret. The device of Ashtary includes two brushlike elements that are brought into contact with one another by a scissors mechanism. Abstract. Ashtary discloses that “the brushlike elements are . . . capable of applying mascara and curling the eyelash [sic] when the elements are brought together via the scissors mechanism.” Col. 3, lines 30-34. Nowhere, however, does Ashtary disclose or suggest that the brushlike elements are capable of applying mascara and curling the eyelashes when the elements are NOT brought together. Therefore, there is nothing that would give one of ordinary skill a reasonable expectation that the brushlike elements of Ashtary would be successful at “applying mascara and curling the eyelash[es],” when incorporated into the device of Gueret, which does not require a mechanism for bringing brushlike elements together.

For at least this reason alone, Appellant submits that the Office Action has failed to carry the initial burden of establishing a *prima facie* case of obviousness under 35 U.S.C. § 103(a). Thus, the rejection of claims 1, 43, 64, 80, and 96 under 35 U.S.C. § 103(a) based on Gueret and Ashtary should be reversed.

Claims 2-12, 14-16, 20-27, 33-42, 44-51, 55, 61, 62, 65-72, 75-79, 81-88, 91-95, 97-104, and 107-111 each depend from one of independent claims 1, 43, 64, 80, and 96. As discussed in the above remarks relating to the Section 103(a) rejection, neither Gueret nor Ashtary nor any combination thereof discloses all of the features recited in independent claims 1, 43, 64, 80, and 96. Moreover, nothing provides any motivation or suggestion for modifying Gueret and/or Ashtary to result in any of claims 1-12, 14-16, 20-27, 33-51, 55, 61, 62, 64-72, 75-88, 91-104, and 107-111. Therefore, the rejection of claims 2-12, 14-16, 20-27, 33-42, 44-51, 55, 61, 62, 65-72, 75-79, 81-88, 91-95, 97-

104, and 107-111 under 35 U.S.C. § 103(a) should be reversed for at least the same above-mentioned reasons that the rejection of claims 1, 43, 64, 80, and 96 should be reversed.

There is no motivation to alter shapes of the devices of the applied references

With regard to claims 14-16 and 55, the Office Action acknowledged that neither Gueret nor Ashtary, nor any combination thereof teaches the “shape of the blank surface being [a] frustoconical-shape, fish-like shape, [or] hourglass-like shape.” Office Action, page 4, lines 14-17. The Examiner alleged that such shapes “would have been obvious to one having an ordinary skill in the art at the time the invention was made . . . since such a modification would have involved a mere change in the shape of the component.” Office Action, page 4, lines 17-21. However, the Office Action provided no motivation, suggestion, or teaching to alter the shapes of the devices of Gueret or Ashtary. In particular, the Office Action merely relies on the Examiner’s unsupported, hindsight speculation, rather than any evidence. For at least this reason, the Office Action has failed to carry the initial burden of establishing a *prima facie* case of obviousness under 35 U.S.C. § 103(a). Thus, the rejection of claims 14-16 and 55 under 35 U.S.C. § 103(a) based on Gueret and Ashtary should be reversed.

Conclusion

For the reasons given above, Appellant respectfully submits that the Section 103(a) rejection of pending claims 1-12, 14-16, 20-27, 33-51, 55, 61, 62, 64-72, 75-88, 91-104, and 107-111 should be reversed.

To the extent any extension of time under 37 C.F.R. § 1.136 is required to obtain entry of this Appeal Brief, such extension is hereby respectfully requested. If there are

any fees due under 37 C.F.R. §§ 1.16 or 1.17 which are not enclosed herewith,
including any fees required for an extension of time under 37 C.F.R. § 1.136, please
charge such fees to our Deposit Account No. 06-0916.

Respectfully submitted,

FINNEGAN, HENDERSON, FARABOW,
GARRETT & DUNNER, L.L.P.

Dated: June 9, 2006

By: /Jeremy T. Thissell/
Jeremy T. Thissell
Reg. No. 56,065

Claims Appendix to Appeal Brief Under Rule 41.37(c)(1)(viii)

1. (Previously presented) A device for applying a product to keratinous fibers, the device comprising:
 - a stem having two opposite ends; and
 - a brush portion connected to one end portion of the stem, the one end portion of the stem having a longitudinal axis and the brush portion having a free end that is not aligned with the longitudinal axis of the one end portion of the stem, wherein the brush portion comprises a core having a core free end, at least part of the core being curved such that a line tangent to the core at any axial position along the core is not perpendicular to the longitudinal axis of the one end portion of the stem and a longitudinal axis of the core free end is not parallel to the longitudinal axis of the one end portion, and wherein the brush portion further comprises bristles connected to the core, the bristles comprising ends defining an envelope surface having a varying cross-section along at least a part of its length, the envelope surface being asymmetrical about a midplane of the envelope surface, the midplane being oriented perpendicular to the core.
2. (Original) The device of claim 1, wherein the brush portion is formed from a blank comprising a blank core and blank bristles having ends defining a blank envelope surface, the blank envelope surface being asymmetrical about a midplane of the blank envelope surface oriented perpendicular to the blank core.

3. (Original) The device of claim 2, wherein an edge portion partially defining the blank envelope surface is nonrectilinear when observed in profile in a direction perpendicular to the blank core, and wherein said edge portion becomes at least partially straightened by curving at least the part of the blank core.

4. (Original) The device of claim 1, wherein the envelope surface has at least one extreme cross-section chosen from a maximum cross-section and a minimum cross-section located axially between axial ends of the envelope surface.

5. (Original) The device of claim 4, wherein the brush portion has a maximum cross-section located axially between axial ends of the envelope surface.

6. (Original) The device of claim 4, wherein the envelope surface has a minimum cross-section located axially between axial ends of the envelope surface.

7. (Original) The device of claim 4, wherein the brush portion has a maximum cross-section and a minimum cross-section located axially between axial ends of the envelope surface.

8. (Original) The device of claim 3, wherein the nonrectilinear edge portion is located in one of a first third and a last third of the length of the blank envelope surface.

9. (Original) The device of claim 3, wherein said nonrectilinear edge portion is outwardly concave.

10. (Original) The device of claim 9, wherein the non rectilinear edge portion is located in the last third of the length of the blank envelope surface, as measured in a direction facing away from a free end of the blank.

11. (Original) The device of claim 3, wherein the nonrectilinear edge portion is outwardly convex.

12. (Original) The device of claim 11, wherein the nonrectilinear edge portion is located in the first third of the length of the blank envelope surface, as measured in a direction facing away from a free end of the blank.

13. (Withdrawn) The device of claim 3, wherein the nonrectilinear edge portion is defined at least in part by a substantially bullet-shaped part of the blank envelope surface, the bullet-shaped part comprising a free end of the blank, and wherein a cross-section of a remainder of the blank envelope surface tapers over at least a part of the length of the blank envelope surface in a direction from the bullet-shaped part toward an end of the blank opposite the free end of the blank.

14. (Original) The device of claim 3, wherein the nonrectilinear edge portion is defined by an intersection of a frustoconical-shaped zone of the blank and a

frustoconical-shaped body portion of the blank, the frustoconical-shaped zone being proximate a free end of the blank and converging toward the free end of the blank, and the frustoconical-shaped body portion extending from the intersection and converging toward an end of the blank opposite the free end of the blank.

15. (Original) The device of claim 3, wherein the blank envelope surface has a fish-like shape, and wherein the nonrectilinear edge portion is defined by a zone proximate a junction between an end portion of the blank envelope surface opposite a free end of the blank and a remainder of the blank envelope surface, the end portion forming a tail of the fish-like shape.

16. (Original) The device of claim 3, wherein the blank envelope surface has an hourglass-like shape, and wherein the nonrectilinear edge portion is defined by a reentrant angle at a junction between two truncated cone shapes forming the hourglass-like shape.

17. (Withdrawn) The device of claim 3, wherein the blank envelope surface defines a football-like shape having at least one cut-out, and wherein the nonrectilinear edge portion is one of defined by the cut-out and lies in a vicinity of an end of the cut-out.

18. (Withdrawn) The device of claim 17, wherein the cut-out is chosen from a notch and a facet.

19. (Withdrawn) The device of claim 17, wherein the nonrectilinear edge portion is deformed by curving at least the part of the blank core so as to cause at least part of the nonrectilinear edge portion to lie substantially on an axis of an edge of a remainder of the blank envelope surface adjacent the nonrectilinear edge portion.

20. (Original) The device of claim 1, wherein the brush portion is formed from a blank comprising a blank core and blank bristles having ends defining a blank envelope surface, the blank envelope surface being substantially circularly symmetrical.

21. (Original) The device of claim 1, wherein the brush portion is formed from a blank comprising a blank core and blank bristles having ends defining a blank envelope surface, the blank envelope surface being substantially axially symmetrical about a longitudinal axis of the core.

22. (Original) The device of claim 1, wherein the brush portion is formed from a blank having a blank core curved about at least one axis disposed outside the midplane of the blank.

23. (Original) The device of claim 1, wherein the core comprises a twisted wire core.

24. (Original) The device of claim 23, wherein the twisted wire core has a left-

hand pitch.

25. (Original) The device of claim 23, wherein the bristles are held between wires of the twisted wire core.

26. (Original) The device of claim 25, wherein the twisted wire core has a left-hand pitch and wherein at least the part of the core is curved so as to decrease an inclination of helical turns formed by free ends of the bristles relative to the longitudinal axis of the end portion of the stem in a direction facing away from the stem.

27. (Original) The device of claim 1, wherein the bristles comprise bristles of differing lengths.

28. (Withdrawn) The device of claim 27, wherein the bristles comprise longer bristles defining the envelope surface of the brush portion and shorter bristles contained within a space defined by the envelope surface.

29. (Withdrawn) The device of claim 1, wherein the brush portion is formed from a blank comprising a blank core and blank bristles having ends defining a blank envelope surface, the blank envelope surface having at least one substantially planar facet formed thereon.

30. (Withdrawn) The device of claim 29, wherein the at least one substantially

planar facet comprises three substantially planar facets and wherein the blank envelope surface has a cross-section that is substantially triangular in shape, at least over a fraction of its length.

31. (Withdrawn) The device of claim 1, wherein the core is curved about at least two axes that are not mutually parallel.

32. (Withdrawn) The device of claim 1, wherein the brush portion has a stepped cross-section over at least part of its length.

33. (Original) The device of claim 1, wherein the core has a nonuniform curvature.

34. (Original) The device of claim 33, wherein the core comprises a curved portion and a rectilinear portion, the rectilinear portion being attached to the stem.

35. (Original) The device of claim 1, further comprising a container configured to contain the product to be applied to the keratinous fibers.

36. (Original) The device of claim 35, further comprising a wiper configured to wipe excess product from the brush portion.

37. (Original) The device of claim 35, further comprising a handle member

attached to an end of the stem opposite the end to which the brush portion is connected.

38. (Original) The device of claim 34, further comprising the product, wherein the container contains the product.

39. (Original) The device of claim 38, wherein the product comprises a mascara product.

40. (Original) The device of claim 1, wherein the brush portion is configured to apply product to eyelashes.

41. (Original) The device of claim 1, wherein the cross-section of the envelope surface varies in a nonmonotonic manner.

42. (Original) The device of claim 1, wherein an entire length of the core of the brush portion to which the bristles are connected is curved.

43. (Previously presented) A method of making an applicator for applying a product to keratinous fibers, the method comprising:

providing a blank comprising a blank core and bristles connected to the blank core, the bristles comprising ends defining a blank envelope surface having a varying cross-section over at least a part of its length and being asymmetrical about a

midplane of the blank envelope surface, the midplane being perpendicular to the blank core; and

curving at least a part of the blank core so as to form a brush portion comprising a core having a core free end and a brush portion free end not aligned with a longitudinal axis of an end portion of a stem to which the brush portion is adapted to be connected,

wherein a line tangent to the core at any axial position along the core is not perpendicular to the longitudinal axis of the end portion of the stem and a longitudinal axis of the core free end is not parallel to the longitudinal axis of the end portion when the brush portion is connected to the end portion of the stem.

44. (Original) The method of claim 43, wherein the cross-section of the blank envelope surface varies in a nonmonotonic manner.

45. (Original) The method of claim 43, wherein the blank core is a twisted wire core.

46. (Original) The method of claim 43, further comprising shaving free ends of at least some bristles to form the variable cross-section of the blank envelope surface.

47. (Original) The method of claim 43, wherein the bristles are configured to apply a product to eyelashes.

48. (Original) The method of claim 47, wherein the product comprises a mascara product.

49. (Original) The method of claim 43, wherein the blank envelope surface, when observed in profile from a direction substantially perpendicular to the blank core, has a nonrectilinear edge portion over at least a part of its length.

50. (Original) The method of claim 49, wherein the curving of the blank core comprises curving the blank core in such a manner so as to reduce a curvature of the nonrectilinear edge portion.

51. (Original) The method of claim 43, wherein the blank envelope surface is substantially circularly symmetrical.

52. (Withdrawn) The method of claim 43, wherein the blank envelope surface has a substantially bullet-like shape.

53. (Withdrawn) The method of claim 43, wherein the blank envelope surface has a substantially buoy-like shape.

54. (Withdrawn) The method of claim 43, wherein the blank envelope surface has a substantially fish-like shape.

55. (Original) The method of claim 43, wherein the blank envelope surface has a substantially hourglass-like shape.

56. (Withdrawn) The method of claim 43, wherein the blank envelope surface has a substantially football-like shape.

57. (Withdrawn) The method of claim 56, wherein the blank comprises at least one facet on the blank envelope surface.

58. (Withdrawn) The method of claim 57, further comprising forming the at least one facet prior to curving the blank core.

59. (Withdrawn) The method of claim 58, wherein the at least one facet comprises three facets.

60. (Withdrawn) The method of claim 43, wherein the curving of the blank core comprises curving the blank core about two axes that are not mutually parallel.

61. (Original) The method of claim 43, wherein the blank core comprises a twisted wire core with a left-hand pitch.

62. (Original) The method of claim 43, wherein the blank core is rectilinear.

63. (Withdrawn) The method of claim 43, wherein the curving of at least the part of the blank core comprises curving an entire length of the blank core to which the bristles are connected.

64. (Previously presented) A device for applying a product to keratinous fibers, the device comprising:

- a stem having two opposite ends; and

- a brush portion connected to one end portion of the stem, the one end portion of the stem having a longitudinal axis and the brush portion having a free end that is not aligned with the longitudinal axis of the one end portion of the stem,

- wherein the brush portion comprises a core, at least part of the core being curved such that a line tangent to the core at any axial position along the core is not perpendicular to the longitudinal axis of the one end portion of the stem,

- wherein the brush portion further comprises bristles connected to the core, the bristles comprising ends defining an envelope surface having a varying cross-section along at least a part of its length, the envelope surface being asymmetrical about a midplane of the envelope surface, the midplane being oriented perpendicular to the core, and

- wherein the envelope surface is noncylindrical proximate the free end of the brush portion.

65. (Previously presented) The device of claim 64, wherein the brush portion is formed from a blank comprising a blank core and blank bristles having ends defining

a blank envelope surface, the blank envelope surface being asymmetrical about a midplane of the blank envelope surface oriented perpendicular to the blank core.

66. (Previously presented) The device of claim 65, wherein an edge portion partially defining the blank envelope surface is nonrectilinear when observed in profile in a direction perpendicular to the blank core, and wherein said edge portion becomes at least partially straightened by curving at least the part of the blank core.

67. (Previously presented) The device of claim 64, wherein the brush portion is formed from a blank comprising a blank core and blank bristles having ends defining a blank envelope surface, the blank envelope surface being substantially circularly symmetrical.

68. (Previously presented) The device of claim 64, wherein the brush portion is formed from a blank comprising a blank core and blank bristles having ends defining a blank envelope surface, the blank envelope surface being substantially axially symmetrical about a longitudinal axis of the core.

69. (Previously presented) The device of claim 64, wherein the brush portion is formed from a blank having a blank core curved about at least one axis disposed outside the midplane of the blank.

70. (Previously presented) The device of claim 64, wherein the core

comprises a twisted wire core.

71. (Previously presented) The device of claim 70, wherein the twisted wire core has a left-hand pitch.

72. (Previously presented) The device of claim 70, wherein the twisted wire core has a left-hand pitch and wherein at least the part of the core is curved so as to decrease an inclination of helical turns formed by free ends of the bristles relative to the longitudinal axis of the end portion of the stem in a direction facing away from the stem.

73. (Withdrawn) The device of claim 64, wherein the brush portion is formed from a blank comprising a blank core and blank bristles having ends defining a blank envelope surface, the blank envelope surface having at least one substantially planar facet formed thereon.

74. (Withdrawn) The device of claim 64, wherein the core is curved about at least two axes that are not mutually parallel.

75. (Previously presented) The device of claim 64, wherein the core has a nonuniform curvature.

76. (Previously presented) The device of claim 75, wherein the core comprises a curved portion and a rectilinear portion, the rectilinear portion being

attached to the stem.

77. (Previously presented) The device of claim 64, further comprising a container configured to contain the product to be applied to the keratinous fibers.

78. (Previously presented) The device of claim 77, further comprising a handle member attached to an end of the stem opposite the end to which the brush portion is connected.

79. (Previously presented) The device of claim 64, wherein the brush portion is configured to apply product to eyelashes.

80. (Previously presented) A device for applying a product to keratinous fibers, the device comprising:

- a stem having two opposite ends; and

- a brush portion connected to one end portion of the stem, the one end portion of the stem having a longitudinal axis and the brush portion having a free end that is not aligned with the longitudinal axis of the one end portion of the stem,

- wherein the brush portion comprises a core, at least part of the core being curved such that a line tangent to the core at any axial position along the core is not perpendicular to the longitudinal axis of the one end portion of the stem,

- wherein the brush portion further comprises bristles connected to the core, the bristles comprising ends defining an envelope surface having a varying cross-section

along at least a part of its length, the envelope surface being asymmetrical about a midplane of the envelope surface, the midplane being oriented perpendicular to the core, and

wherein the envelope surface tapers toward the free end of the brush portion.

81. (Previously presented) The device of claim 80, wherein the brush portion is formed from a blank comprising a blank core and blank bristles having ends defining a blank envelope surface, the blank envelope surface being asymmetrical about a midplane of the blank envelope surface oriented perpendicular to the blank core.

82. (Previously presented) The device of claim 81, wherein an edge portion partially defining the blank envelope surface is nonrectilinear when observed in profile in a direction perpendicular to the blank core, and wherein said edge portion becomes at least partially straightened by curving at least the part of the blank core.

83. (Previously presented) The device of claim 80, wherein the brush portion is formed from a blank comprising a blank core and blank bristles having ends defining a blank envelope surface, the blank envelope surface being substantially circularly symmetrical.

84. (Previously presented) The device of claim 80, wherein the brush portion is formed from a blank comprising a blank core and blank bristles having ends defining a blank envelope surface, the blank envelope surface being substantially axially

symmetrical about a longitudinal axis of the core.

85. (Previously presented) The device of claim 80, wherein the brush portion is formed from a blank having a blank core curved about at least one axis disposed outside the midplane of the blank.

86. (Previously presented) The device of claim 80, wherein the core comprises a twisted wire core.

87. (Previously presented) The device of claim 86, wherein the twisted wire core has a left-hand pitch.

88. (Previously presented) The device of claim 86, wherein the twisted wire core has a left-hand pitch and wherein at least the part of the core is curved so as to decrease an inclination of helical turns formed by free ends of the bristles relative to the longitudinal axis of the end portion of the stem in a direction facing away from the stem.

89. (Withdrawn) The device of claim 80, wherein the brush portion is formed from a blank comprising a blank core and blank bristles having ends defining a blank envelope surface, the blank envelope surface having at least one substantially planar facet formed thereon.

90. (Withdrawn) The device of claim 80, wherein the core is curved about at

least two axes that are not mutually parallel.

91. (Previously presented) The device of claim 80, wherein the core has a nonuniform curvature.

92. (Previously presented) The device of claim 91, wherein the core comprises a curved portion and a rectilinear portion, the rectilinear portion being attached to the stem.

93. (Previously presented) The device of claim 80, further comprising a container configured to contain the product to be applied to the keratinous fibers.

94. (Previously presented) The device of claim 93, further comprising a handle member attached to an end of the stem opposite the end to which the brush portion is connected.

95. (Previously presented) The device of claim 80, wherein the brush portion is configured to apply product to eyelashes.

96. (Previously presented) A device for applying a product to keratinous fibers, the device comprising:

a stem having two opposite ends; and

a brush portion connected to one end portion of the stem, the one end portion of the stem having a longitudinal axis and the brush portion having a free end that is not aligned with the longitudinal axis of the one end portion of the stem,

wherein the brush portion comprises a core, at least part of the core being curved such that a line tangent to the core at any axial position along the core is not perpendicular to the longitudinal axis of the one end portion of the stem,

wherein the brush portion further comprises bristles connected to the core, the bristles comprising ends defining an envelope surface having a cross-section that continuously varies from the free end of the brush portion to a location along the length of the brush portion, the envelope surface being asymmetrical about a midplane of the envelope surface, the midplane being oriented perpendicular to the core.

97. (Previously presented) The device of claim 96, wherein the brush portion is formed from a blank comprising a blank core and blank bristles having ends defining a blank envelope surface, the blank envelope surface being asymmetrical about a midplane of the blank envelope surface oriented perpendicular to the blank core.

98. (Previously presented) The device of claim 97, wherein an edge portion partially defining the blank envelope surface is nonrectilinear when observed in profile in a direction perpendicular to the blank core, and wherein said edge portion becomes at least partially straightened by curving at least the part of the blank core.

99. (Previously presented) The device of claim 96, wherein the brush portion is formed from a blank comprising a blank core and blank bristles having ends defining a blank envelope surface, the blank envelope surface being substantially circularly symmetrical.

100. (Previously presented) The device of claim 96, wherein the brush portion is formed from a blank comprising a blank core and blank bristles having ends defining a blank envelope surface, the blank envelope surface being substantially axially symmetrical about a longitudinal axis of the core.

101. (Previously presented) The device of claim 96, wherein the brush portion is formed from a blank having a blank core curved about at least one axis disposed outside the midplane of the blank.

102. (Previously presented) The device of claim 96, wherein the core comprises a twisted wire core.

103. (Previously presented) The device of claim 102, wherein the twisted wire core has a left-hand pitch.

104. (Previously presented) The device of claim 102, wherein the twisted wire core has a left-hand pitch and wherein at least the part of the core is curved so as to

decrease an inclination of helical turns formed by free ends of the bristles relative to the longitudinal axis of the end portion of the stem in a direction facing away from the stem.

105. (Withdrawn) The device of claim 96, wherein the brush portion is formed from a blank comprising a blank core and blank bristles having ends defining a blank envelope surface, the blank envelope surface having at least one substantially planar facet formed thereon.

106. (Withdrawn) The device of claim 96, wherein the core is curved about at least two axes that are not mutually parallel.

107. (Previously presented) The device of claim 96, wherein the core has a nonuniform curvature.

108. (Previously presented) The device of claim 107, wherein the core comprises a curved portion and a rectilinear portion, the rectilinear portion being attached to the stem.

109. (Previously presented) The device of claim 96, further comprising a container configured to contain the product to be applied to the keratinous fibers.

110. (Previously presented) The device of claim 109, further comprising a

handle member attached to an end of the stem opposite the end to which the brush portion is connected.

111. (Previously presented) The device of claim 96, wherein the brush portion is configured to apply product to eyelashes.

Evidence Appendix to Appeal Brief Under Rule 41.37(c)(1)(ix)

There is no evidence being relied upon by appellant in this appeal.

Related Proceedings Appendix to Appeal Brief Under Rule 41.37(c)(1)(x)

There are no decisions from related proceedings.